

**Letter of Findings: 07-0516 and 07-0517
Sales and Use Tax
For the Years 1997 through 2006**

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-6-1; IC § 6-2.5-9-3; IC § 6-8.1-5-1; IC § 6-8.1-5-4; Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the Department's "best information available" assessments.

II. Tax Administration – Imposition of Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

The Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana retail merchant selling jewelry and other gift items at a retail location, including sales of older inventory on EBay. Taxpayer registered in 1994 as a seasonal business and selected to file ST-103s from March through November. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 1997 through 2005 and a second separate audit for 2006. The Department found that Taxpayer had failed to file ST-103s for several periods beginning in March 1997 through June 2006. The Department assessed Taxpayer additional sales tax. Taxpayer protested the assessments. A hearing on the protests was held and this Letter of Findings encompassing both protests ensues. Additional facts will be provided as necessary; however, as a preliminary matter it should be noted that Taxpayer participated in the Amnesty program with partial payments being made through the program. Taxpayer does not have a current payment plan on the remaining balance.

I. Sales Tax – Imposition.

DISCUSSION

The Department found that Taxpayer did not have complete records covering the audit period. The requested records included sales journals, bank statements, general ledgers and federal tax returns for the company. The only records available were bank statements from 2000 through 2006. The auditor used bank deposits to determine gross receipts. In order to determine gross sales for the years prior to 2000, the auditor averaged 2000 and 2001 and applied the average to 1997, 1998, and 1999. The auditor also changed Taxpayer's filing status to monthly and filed zero returns for January, February and December of the audit years.

Taxpayer also informed the auditor that it had been selling merchandise through the Internet since 2001, but the records to verify the Internet sales were not available. Taxpayer did acquire some records from Pay Pal and another vendor. The auditor gave Taxpayer credit for certain exempt sales.

Taxpayer concedes that it owes additional sales tax, however Taxpayer protested that the Department overestimated its sales because the Department did not fully take into account Internet sales. Early on in its protest of the assessment, a former representative of Taxpayer prepared a report that detailed what it considered sales tax due – based on actual invoices - which reduced the Department's assessment by 16 percent. Unfortunately, Taxpayer has been unable to substantiate this report with the requisite source documentation since apparently those documents have been destroyed.

All tax assessments are prima facie evidence that the Department's claim for the tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1(a) imposes an excise tax, known as the state gross retail tax, on retail transactions made in Indiana. This tax is referred to commonly as "sales tax." IC § 6-2.5-2-1(b) states that the person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided by law, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant is required to collect the tax as agent for the state. IC § 6-2.5-2-1(b). IC § 6-2.5-6-1 states the method and timetable by which a retail merchant is obligated to remit the collected sales tax to the State of Indiana, through the Department of Revenue. IC § 6-2.5-9-3 states that a retail merchant has a duty to remit Indiana gross retail tax to the Department, holds those taxes in trust for the State, and is personally liable for the payment of those taxes to the State.

Taxpayer is a registered retail merchant with the State of Indiana and holds a retail merchant's certificate. It is required to calculate and collect sales tax from its customers on its sales and to remit those taxes to the

Department.

IC § 6-8.1-5-4 states that taxpayers must keep books and records so that the Department can review them to determine tax liabilities. IC § 6-8.1-5-1(a) states that the Department shall make a proposed assessment of tax liability amounts on the basis of the best information available to the Department. Taxpayer has been afforded the opportunity to present records and information to rebut the proposed assessment.

There is no dispute in this case that Taxpayer is a retail merchant selling at retail in Indiana and therefore had a duty to collect and remit Indiana sales tax on retail transactions in the state. Without proper documentation, Taxpayer is unable to meet its burden to overcome the Department's assessment.

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Imposition of Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has not affirmatively established that its failure to collect and remit sales tax on its sales was due to reasonable cause and not due to negligence, as required by [45 IAC 15-11-2](#)(c).

FINDING

Taxpayer's protest is respectfully denied.

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